A **FANUC SDN BHD v. ADENLAND (CHERAS) SDN BHD & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR
DARRYL GOON SIEW CHYE J
[CIVIL SUIT NO: WA-22NCVC-120-03-2017]
1 JULY 2019

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TORT: *Trespass – Trespass to land – Wrongful removal of earth – Vicarious liability – Construction of retaining wall for development – Removal of earth from another land by contractor appointed by developer – Whether there was vicarious liability – Whether developer employer of contractor – Whether contractor servant and/or agent of developer – Whether developer had control over contractor – Whether developer liable for acts/conduct of contractor*

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TORT: *Trespass – Damages – Claim for – Construction of retaining wall for development – Removal of earth from another land by contractor appointed by developer – Claim for special, general, exemplary and aggravated damages – Whether damages proven – Whether claim ought to be allowed*

D

EVIDENCE: *Admissibility – Without prejudice communications – Construction of retaining wall for development – Removal of earth from another land by contractor appointed by developer – Developer and land proprietor entered into negotiations to resolve dispute – Negotiation communications by developer to land proprietor marked with 'without prejudice' – Whether there was contract concluded following negotiations – Whether correspondences between parties allowed to be used to prejudice either party – Whether contrary to principle against disclosure of without prejudice negotiations and public policy – Whether correspondences relating to parties' negotiations admissible*

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The plaintiff was the registered proprietor of a piece of land which was on high grounds. The first defendant, a housing developer involved in a project of building apartments ('project'), proposed to Majlis Perbandaran Kajang ('MPKJ') to construct a retaining wall along a road reserve to prevent erosion and landslide flowing from the plaintiff's land. Approvals for constructing the retaining wall and associated earthworks were subsequently obtained from the MPKJ, subject to terms and conditions that (i) the first defendant secures the approval of neighbouring lots if it was expected that any encroachment may occur; and (ii) care must be taken in respect of nearby properties. Before commencing the works, the first defendant emailed the plaintiff with a proposal to 'cut the slope' at the border of the plaintiff's land. However, there was no response from the plaintiff. The retaining wall, constructed by the second defendant who was a contractor appointed by the first defendant, was constructed along the road reserve and was located several metres away from the boundary of the plaintiff's land. The director of the plaintiff ('PW10') later observed an earthmover/bulldozer and a

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number of lorries removing earth from the plaintiff's land. PW10 approached the manager of the second defendant ('Lim'), who agreed that the second defendant had 'cut' into the plaintiff's land, and told him that the instructions came from the first defendant. The parties then entered into negotiations for an amicable resolution. Apart from the first defendant's letter to the plaintiff's engineers, all of the first defendant's correspondences with the plaintiff were marked 'strictly without prejudice' or 'without prejudice'. On the other hand, the plaintiff's replies and letters to the first defendant, except for one, were not so marked. The negotiations took a period of two years but there was no concluded contract between the parties to settle the dispute. The plaintiff then commenced the present action based on trespass and negligence. In its statement of claim, the plaintiff pleaded (i) that broad points of settlement were reached following the negotiations. The plaintiff sought to adduce evidence of the negotiations. According to the plaintiff, the initial part of the negotiations was not on a without prejudice basis and only the subsequent negotiations were; and (ii) the trespass was committed by the first defendant, its servants and/or agents. Thus, liability through the first defendant's servants was pleaded. The plaintiff further claimed for (i) special damages for (a) the cost of reinstatement of the plaintiff's land in the amount of RM1,362,405; and (b) consultancy fees totaling RM80,708.22; and (ii) exemplary and aggravated damages premised on the allegation that by reason of the trespass, the retaining wall that the first defendant had to construct was lower and thus cheaper.

Held (dismissing claim):

(1) Although it was pleaded by the plaintiff that broad points of settlement were reached following the negotiations, no concluded contract of settlement agreement was actually pleaded or relied on as a cause of action. The assertion pleaded was not synonymous with there being any concluded contract. (paras 28 & 41)

(2) Apart from the letter sent by the first defendant to the plaintiff's engineers, which did not seem prejudicial in itself, all the first defendant's letters to the plaintiff were marked indicating that they were sent on a without prejudice basis. It was plain and obvious and could not be missed. The first defendant's intention that the negotiations were to be on a without prejudice basis was manifest. Once it is established that the negotiations were to resolve the dispute, and particularly where it is indicated that the negotiations were on a without prejudice basis, the entire negotiations will not be allowed to be used to prejudice either party. Without claiming that a concluded settlement agreement had been arrived at, evidence of the negotiations could only be intended to prejudice the first defendant, contrary to the very rationale for the

principle against disclosure of without prejudice negotiations and the public policy upon which it rests. Therefore, the correspondences relating to the parties' negotiations were inadmissible. (paras 39, 40, 42 & 43)

(3) The first defendant did not lead any evidence to suggest that there was no act of trespass by the second defendant. Insofar as the alleged trespass by the second defendant was concerned, the testimony of PW10 stood uncontradicted. However, it was not established that the first defendant participated or was involved in the actual physical act of trespass. The evidence was that the actual physical act of trespass was committed by the second defendant but it was also not established that the first defendant had instructed the second defendant to commit the trespass or that the first defendant's plans approved by MPKJ, when followed by the second defendant, would have resulted in the trespass. Although the plaintiff invoked and pleaded agency, there was no evidence that the scope of the second defendant's agency in relation to the construction of the retaining wall included any necessary trespass onto the plaintiff's land. On a balance of probabilities, none of the features that would impose liability on the first defendant through the agency of the second defendant was established or proven in this case. (paras 47-50 & 58)

(4) Under the principle of vicarious liability, an employer may be held liable for the tortious conduct of an employee committed within the course of the employee's employment. The second defendant was a contractor engaged by the first defendant but the plaintiff sought to demonstrate the element of control by reference to the letter of award issued by the first defendant to the second defendant. However, the clauses in the letter of award pertained to the scope of works and responsibility placed on the second defendant rather than control over the second defendant or how it was to carry out the works. What the second defendant was doing was not part of the business activity of the first defendant as such. The second defendant was carrying on its own business in performing a contract that it had secured from the first defendant. Based on the letter of award, there was nothing to indicate that the second defendant, which was organised as a limited company with its own place of business, was not a separate and independent enterprise of its own. (paras 60, 69 & 71-73)

(5) The retaining wall was on the road reserve and several metres away from the boundary of the plaintiff's land. It was not a non-natural use of land or property occupied by the first defendant. It was not a case of nuisance. The construction of the retaining wall could not be said to be an activity that was inherently hazardous. It was not as if the retaining wall erected failed or that the second defendant was incompetent. It was

not trespass or damage caused in the execution or conduct of an inherently hazardous activity. What happened here was a conscious act of 'cutting down' the plaintiff's land and the removal of earth therefrom. Clearly, the second defendant had gone beyond merely building the retaining wall based on the approval by MPKJ. (paras 87, 88 & 93)

(6) Reasonableness is a factor for determining the loss suffered rather than for determining between the remedies of reinstatement or diminution in value of the land. Judgment was entered against the second defendant in the sum of RM80,841.78 as special damages and RM500,000 as general damages. However, it was not established that the actual height of the retaining wall built by the second defendant according to the plans approved by MPKJ was appreciably lower than what was intended and approved. In any event, no liability had been found as against the first defendant. Furthermore, no damage was suffered by the plaintiff that could not be adequately compensated with damages without resorting to aggravated damages. As against the second defendant, all that had been established was its trespass. There was no reason why the normal heads of damages, as opposed to exemplary and aggravated damages, would not be appropriate or adequate. (paras 117, 127, 129 & 132)

Case(s) referred to:

Amm Joy (Suing As Chairman Committee Members Of Wat Boonyaram) v. Chuan Seng Sdn Bhd [2018] 1 LNS 474 CA ***(refd)***

Beatrice Ramanathan (F) & Anor v. Shah Alam Properties Sdn Bhd & Another Case [1994] 4 CLJ 646 HC ***(refd)***

Biffa Waste Services Ltd and Another v. Maschinenfabrik Ernst Hese GmbH and Others [2009] 3 WLR 324 ***(refd)***

Broome v. Cassell & Co Ltd [1971] 2 QB 354 ***(refd)***

Datuk Bandar Dewan Bandaraya Kuala Lumpur v. Ong Kok Peng & Anor [1993] 3 CLJ 205 SC ***(refd)***

Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal [2018] 3 CLJ 427 FC ***(refd)***

Dr Kok Choong Seng & Anor v. Soo Cheng Lin & Another Appeal [2017] 10 CLJ 529 FC ***(refd)***

Dusun Desaru Sdn Bhd & Anor v. Wang Ah Yu & Ors [1999] 2 CLJ 749 HC ***(refd)***

Freeman v. Rosher [1849] 13 QB 780 ***(refd)***

Harbutt's Plasticine Ltd v. Wayne Tank and Pump Co Ltd [1970] 1 All ER 225 ***(refd)***

Hollebone v. Midhurst and Fernhurst Builders Ltd [1968] 1 Lloyd's Rep 38 ***(refd)***

Honeywill and Stein Ltd v. Larking Bros (London's Commercial Photographers) Ltd [1934] 1 KB 191 ***(refd)***

Joel v. Morison [1834] 172 ER 1338 ***(refd)***

Jumbo Top Sdn Bhd v. Automotive Corporation (M) Sdn Bhd [2007] 1 LNS 360 HC ***(refd)***

Kee Boon Suan & Ors v. Adventist Hospital & Clinical Services (M) & Ors And Other Appeals [2018] 6 CLJ 334 CA ***(refd)***

Laksmana Realty Sdn Bhd v. Goh Eng Hwa [2005] 4 CLJ 871 CA ***(refd)***

A *Malayan Banking Bhd v. Foo See Moi [1981] 1 LNS 95 FC* ***(refd)***
MCST Plan No 3322 v. Tiong Aik Construction Pte Ltd [2016] SGCA 40 ***(refd)***
Mehrzad Nabavieh & Anor v. Chong Shao Fen & Anor And Another Appeal [2016] 5 CLJ 236 CA ***(refd)***
Milik Perusahaan Sdn Bhd & Anor v. Kembang Masyur Sdn Bhd [2003] 1 CLJ 12 CA ***(refd)***
B *MKC Corporate & Business Advisory Sdn Bhd lwn. Cubic Electronics Sdn Bhd & Yang Lain [2016] 8 CLJ 104 HC* ***(refd)***
Ng Huat Seng v. Munib Mohammad Madni [2017] SGCA 58 ***(refd)***
Oceanbulk Shipping and Trading SA v. TMT Asia Ltd and Others [2010] 4 All ER 1011 ***(refd)***
Rookes v. Barnard [1964] 1 All ER 367 ***(refd)***
C *Rush & Tompkins Ltd v. Greater London Council and Another [1988] 3 All ER 737* ***(refd)***
Ruxley Electronics and Construction Ltd v. Forsyth; Laddingford Enclosures Ltd v. Forsyth [1995] 3 All ER 268 ***(refd)***
Rylands v. Fletcher [1861-73] All ER Rep 1 ***(refd)***
Sambaga Valli K R Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors & Another Appeal [2017] 1 LNS 500 CA ***(refd)***
D *Tan Wee Choon v. Ong Peck Seng & Anor [1985] 1 CLJ 478; [1985] CLJ (Rep) 798 HC* ***(refd)***
Terra Damansara Sdn Bhd v. Nandex Development Sdn Bhd [2006] 8 CLJ 657 HC ***(refd)***
Unilever plc v. The Procter & Gamble Co [2001] 1 All ER 783 ***(refd)***
Various Claimants v. Catholic Child Welfare Society and Others [2013] 2 AC 1 ***(refd)***
E *Ward v. Cannock Chase District Council [1986] Ch 546* ***(refd)***
Woodland v. Essex County Council [2014] 1 All ER 482 ***(refd)***

Other source(s) referred to:
Norchaya Talib, *Law of Torts In Malaysia,* 2nd edn, p 384

For the plaintiff - Ramesh Gopal & Joanna K Thevathasan; M/s Rajes Hisham Rahim
F *& Gopal*
For the 1st defendant - Ong Swee Long & Yap Zhen Jun; M/s Armiy Rais
For the 2nd defendant - No Appearance

Reported by Najib Tamby

JUDGMENT

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Darryl Goon Siew Chye J:

[1] This was a suit in trespass and negligence against the defendants in respect of a piece of land in Hulu Langat, Selangor, that belongs to the plaintiff.

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[2] In substance, the plaintiff's claim was based on an alleged wrongful removal of earth from and the levelling of its land in the course of the construction of a retaining wall on a road reserve adjacent to it. The alleged wrongful removal of earth resulted in varying reductions in height along the affected parts of the plaintiff's land.

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Background

[3] The plaintiff is the registered proprietor of Lot 14761 (formerly Lot 1169, Geran Mukim 1129), Cheras Batu 9, Mukim of Ulu Langat, Daerah Ulu Langat, Selangor ("plaintiff's land"). The plaintiff's land measures 3.908 hectares (approximately 421,000sq ft) in size.

[4] The first defendant is a housing developer and was the developer of a proposed building development consisting of a twenty three stories block of apartments and two, four stories blocks of apartments on Lot PT 5700 and 5701 measuring 3.36 acres in the Mukim of Hulu Langat, District of Hulu Langat, Selangor Darul Ehsan ("first defendant's project"). This was a project approved by the Majlis Perbandaran Kajang ("MPKJ") in 2013.

[5] The plaintiff's land is on high ground. Below and adjacent to part of the plaintiff's land is a road known as Jalan Kemacahaya. Just before Jalan Kemacahaya, between the plaintiff's land and Jalan Kemacahaya, is a stretch of road reserve.

[6] In order to prevent erosion and landslide flowing from the plaintiff's land and in connection with the first defendant's project, the first defendant put forward a proposal to the MPKJ to construct a retaining wall along the road reserve located below and adjacent to the plaintiff's land. The retaining wall was to be sited several metres away from the boundary of the plaintiff's land.

[7] Approvals for constructing a reinforced concrete retaining wall and associated earthworks were subsequently obtained from the MPKJ on 20 January 2014. In granting the approvals and attached to MPKJ's letter of 20 January 2014 to the plaintiff's consultants were various terms and conditions imposed by MPKJ.

[8] Before commencement of works, the first defendant approached the plaintiff with a proposal to "cut the slope" at the border of the plaintiff's land. By doing this, the first defendant had hoped to avoid building the proposed retaining wall and at the same time possibly conferring a benefit on the plaintiff by creating accessibility to the plaintiff's land.

[9] This proposal was evidenced by two emails dated 21 February 2014 and 10 March 2014 respectively, sent by the first defendant to the plaintiff. The proposal, however, drew no response from the plaintiff.

[10] For the purposes of constructing the retaining wall, the first defendant appointed the second defendant. The second defendant was a contractor. The second defendant was issued a letter of appointment by the first defendant dated 10 September 2014.

[11] It was common ground that the retaining wall was eventually constructed by the second defendant. It was constructed along the road reserve and the retaining wall itself was located several metres away from the boundary of the plaintiff's land.

[12] The second defendant, although served, did not enter an appearance to this action and did not participate in the trial.

Discovery Of The Trespass

[13] On 20 October 2014, PW10 who was a director and main shareholder of the plaintiff, together with his driver (PW1), observed an earthmover/bulldozer and a number of lorries engaged in earthworks on the plaintiff's land. They were removing earth from the plaintiff's land.

[14] PW10 testified to approaching one Mr Simon Lim, who claimed to be the manager of the second defendant. PW10 testified that Mr Lim agreed that the second defendant had "cut" into the plaintiff's land and told him that this was on the instructions of the first defendant. PW10 also testified to noticing that that part of the plaintiff's land that was worked on by the second defendant had reduced in height.

[15] On the very same day, 20 October 2014, PW10 lodged a police report in relation to the trespass and of his conversation with Mr Lim. The police however viewed the matter as a civil dispute and took no further action.

[16] The plaintiff also followed up with a complaint to the engineering division of MPKJ and a complaint to the Board of Engineers Malaysia.

[17] The first defendant subsequently learnt of the plaintiff's police report and complaint to MPKJ from the second defendant.

Negotiations For A Settlement

[18] Following the discovery of the trespass, the parties entered into negotiations for an amicable resolution.

[19] Towards this end, the parties met in the Bangsar Shopping Centre in Kuala Lumpur on 22 October 2014. This meeting was followed by a letter the following day from the plaintiff to one Mr Lim Kean Hong of the first defendant dated 23 October 2014.

[20] In this letter, the plaintiff recounted that Mr Lim Kean Hong had acknowledged that the first defendant's earthwork contractor had wrongfully removed earth from the plaintiff's land and that the first defendant had offered settlement by way of reinstatement or compensation. This letter from the plaintiff was not indicated to have been sent on a "without prejudice" basis.

[21] By a letter of even date, ie, 23 October 2014, the first defendant wrote to the plaintiff's engineers providing the latter with copies of the various approved plans. This letter too, did not indicate that it was sent without prejudice to the first defendant. A

[22] DW2, the chief executive officer of the first defendant who was present at the meeting in Bangsar Shopping Centre, testified that it was made clear at the meeting that the negotiation for settlement was intended to be on a "without prejudice" basis. B

[23] Apart from the first defendant's letter to the plaintiff's engineers providing them with copies of the various approved plans, all of the first defendant's subsequent correspondences with the plaintiff were clearly marked "strictly without prejudice" or "without prejudice". C

[24] On the other hand, the plaintiff's replies and letters to the first defendant, written by PW10, were not so marked except for one of its letters sent dated 29 May 2015. However, very shrewdly, the letters sent by the plaintiff in the course of the negotiations did repeatedly reserve the plaintiff's rights in the matter. D

[25] While the first defendant was quite willing to disclose the fact that it did enter into negotiations with the plaintiff for an amicable resolution, the fact remained that it had consistently maintained, and expressly stated in all its correspondences with the plaintiff, that the negotiations were without prejudice. E

[26] According to DW2, the first defendant tried to settle the matter by negotiations in order to avoid disruption to its work programme and also as a gesture of goodwill. F

[27] The negotiations were over a fairly long period of around two years. Drawings were exchanged with proposals and counter proposals. From the letters it seemed clear that both sides took time in responding. No particular urgency was displayed by the parties. It cannot be said that the length of time the negotiations took was entirely due to either party. G

[28] Finally, the negotiations fell through. There was no concluded contract between the parties to settle the dispute. This was common ground. Although it was pleaded by the plaintiff in its statement of claim that broad points of settlement were reached following these negotiations, no concluded contract or settlement agreement was actually pleaded or relied on as a cause of action. H

[29] In fact, in his submissions in reply after the trial, learned counsel for the plaintiff made it clear that the causes of action relied on by the plaintiff were trespass and negligence. I

[30] What the plaintiff sought to do, however, was to adduce evidence of the negotiations. The first defendant objected.

[31] In *Malayan Banking Bhd v. Foo See Moi* [1981] 1 LNS 95; [1981] 2 MLJ 17 at p. 18, Chang Min Tat FJ said:

> It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but to enlarge the scope of the negotiations, so that a solution acceptable to both sides can be more easily reached. But it is also settled law where negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of the agreement, unless of course the agreement has become incorporated in another document which would then be the evidence of the agreement.

(see also *Dusun Desaru Sdn Bhd & Anor v. Wang Ah Yu & Ors* [1999] 2 CLJ 749; [1999] 5 MLJ 449 and *Jumbo Top Sdn Bhd v. Automotive Corporation (M) Sdn Bhd* [2007] 1 LNS 360; [2008] 1 MLJ 718).

[32] The plaintiff sought to distinguish the initial part of the settlement negotiations from the later part of the negotiations. The plaintiff maintained that the initial part of the negotiations was not on a without prejudice basis, only the subsequent negotiations were. As for this attempt by the plaintiff, the answer is to be found in the observation of Robert Walker LJ in *Unilever plc v. The Procter & Gamble Co* [2001] 1 All ER 783 at p. 796, after a survey of modern authorities on the subject, where he concluded:

> ... Whatever difficulties there are in a complete reconciliation of those cases, they make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. *They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for special reasons) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lord Griffiths in Rush & Tomkins Ltd v. Greater London Council [1988] 3 All ER 737 at 740, [1989] AC 1280 at 1300: 'to speak freely about issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts.'* Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders. (emphasis added)

[33] In *Rush & Tompkins Ltd v. Greater London Council and Another* [1988] 3 All ER 737 at pp. 739 to 740, Lord Griffiths said:

> *The 'without prejudice rule' is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish ...*

The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent on the use of the phrase 'without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission. I cannot therefore agree with the Court of Appeal that the problem in the present case should be resolved by a linguistic approach to the meaning of the phrase 'without prejudice'. I believe that the question has to be looked at more broadly and resolved by balancing two different public interests, namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation. (emphasis added)

[34] A list of the exceptions to the principle applicable was set out by Robert Walker LJ in *Unilever plc* (*supra*) at pp. 791 to 792:

Nevertheless, there are numerous occasions on which, despite the existence of without prejudice negotiations, the without prejudice rule does not prevent the admission into evidence of what one or both of the parties said or wrote. The following are among the most important instances.

(1) ... when the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible. ...

(2) ... to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence. ...

(3) Even if there is no concluded compromise, a clear statement which is made by one party to negotiations, and on which the other party is intended to act and does in fact act, may be admissible as giving rise to an estoppel. ...

(4) ... one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other 'unambiguous impropriety' ...

(5) Evidence of negotiations may be given (for instance, on an application to strike out proceedings for want of prosecution) in order to explain delay or apparent acquiescence. ...

(6) In *Muller*'s case (which was a decision on discovery, not admissibility) ... Hoffmann LJ treated that issue as one unconnected with the truth or falsity of anything stated in the negotiations, and as therefore falling outside the principle of public policy protecting without prejudice communications. ...

> (7) The exception (or apparent exception) for an offer expressly made 'without prejudice except as to costs' was clearly recognised by this court in *Cutts v. Head*, and by the House of Lords in the Rush & Tompkins case, as based on an express or implied agreement between the parties. ...
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> (8) In matrimonial cases there has developed what is now a distinct privilege extending to communications received in confidence with a view to matrimonial conciliation ...

[35] The above exceptions to the rule are set out at some length largely because *Unilever plc* was singled out by Lord Clarke in the Supreme Court in *Oceanbulk Shipping and Trading SA v. TMT Asia Ltd and Others* [2010] 4 All ER 1011 at p. 1019 with the comment that, "In particular, in the *Unilever* case Robert Walker LJ (with whom Simon Brown LJ and Wilson J agreed) set out the general position with great clarity." and was quoted extensively by Lord Clarke (see also *MKC Corporate & Business Advisory Sdn Bhd lwn. Cubic Electronics Sdn Bhd & Yang Lain* [2016] 8 CLJ 104; [2015] 11 MLJ 775 at pp. 806-807).

[36] In *Unilever plc*, it was also recognised that the protection afforded by public policy may be removed in cases of unequivocal abuse. As stated by Robert Walker LJ at p. 796 of the report:

> Lord Griffiths in the *Rush & Tompkins* case noted, and more recent decisions illustrate, that even in situations to which the without prejudice rule undoubtedly applies, **the veil imposed by public policy may have to be pulled aside, even so as to disclose admissions, in cases where the protection afforded by the rule has been unequivocally abused.**
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> (emphasis added)

[37] In the court's view, there was no unequivocal abuse of the principle by the first defendant demonstrated in this case. None of the exceptions identified in *Unilever plc* was established by the plaintiff. There may have been agreements on the way forward towards a settlement and on certain issues but, ultimately, it was simply a case where an attempt at settlement failed.

[38] The parties were locked in negotiations over a period of time. If it was reckoned that the negotiations were too protracted, the parties had only themselves to blame. There was nothing to prevent the plaintiff from calling off the negotiations earlier and to commence legal action if it had considered that the negotiations were taking too long or if it was thought the first defendant's *bona fides* was in question.

[39] Apart from the letter that was sent by the first defendant to the plaintiff's engineers enclosing the various plans, which does not seem prejudicial in itself, all the first defendant's letters to the plaintiff were marked indicating that they were sent on a without prejudice basis. It was plain and obvious and could not be missed. The first defendant's intention that the negotiations were to be on a without prejudice basis was manifest.

[40] Based on the authorities cited above, once it is established that the negotiations were to resolve the dispute, and particularly where it was indicated that the negotiations were on a without prejudice basis, the entire negotiations will not be allowed to be used to prejudice either party.

[41] In fact, there was no justification for pleading or attempting to lead evidence of the contents of these letters especially when it was not contended that a concluded settlement agreement had come about and enforcement of it sought. The assertion pleaded that, "broad points of settlement was reached between the parties" is not synonymous with there being any concluded contract.

[42] Without claiming that a concluded settlement agreement had been arrived at, evidence of the negotiations can only be intended to prejudice the first defendant, contrary to the very rationale for the principle against disclosure of without prejudice negotiations and the public policy upon which it rests.

[43] In the circumstances, and bearing in mind the fact that it was not contended that any concluded settlement agreement had come into being, the correspondences relating to the parties' negotiations were therefore not admissible.

The Tortious Act

[44] In *Tan Wee Choon v. Ong Peck Seng & Anor* [1985] 1 CLJ 478; [1985] CLJ (Rep) 798 at pp. 799-800, Wan Yahya J stated of trespass thus:

> *Trespass to land unlike criminal trespass is completed once a person wrongfully, albeit peaceably, intrudes into the land in the possession of another, even where no damage is done. Trespass to land covers all unlawful entry and includes taking possession, pulling down or destroying anything permanently fixed to the land.* The following passage of what constitutes trespass to land is found in *Halsbury's Laws of England* Edn. 3 Vol. 38 at p. 739:
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> > Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies, although no actual damage is done. *A person trespasses upon land if he wrongfully sets foot on, or rides or drives over, it, or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it,* or places or fixes anything on it or in it, or, it seems, if he erects or suffers to continue on his own land anything which invades the airspace of another, or if he discharges water from another's land, or sends filth or any injurious substance which has been collected by him on his own land on to another's land. (emphasis added)

[45] In *JMJ Food & Beverages Sdn Bhd v. Mohamad Zukrillah Ismail & Ors* [2016] 4 CLJ 368, Zamani A Rahim JCA speaking for the majority stated:

A [86] The starting point is, what is trespass in law? The definition of trespass may be gleaned in *Oakfield Enterprises Sdn Bhd v. Tenaga Nasional Bhd* [1998] 1 LNS 430; [1998] MLJU 70:

> ... what is trespass of land? *Clerk & Lindsell on Torts* (Seventeenth Edition) at page 837 defines trespass of land as follows:
>
> B Trespass to land consists in any unjustifiable intrusion by one person upon land in the possession of another.

[46] It is clear beyond argument that the removal of earth from land belonging to another and reducing it in height without the consent of the registered proprietor is trespass plain and simple. Trespass is actionable *per* C *se* and no damage need be proven (see *Terra Damansara Sdn Bhd v. Nandex Development Sdn Bhd* [2006] 8 CLJ 657, *Amm Joy (Suing As Chairman Committee Members Of Wat Boonyaram) v. Chuan Seng Sdn Bhd* [2018] 1 LNS 474; [2018] 5 MLJ 255).

D **Claim Against The First Defendant**

[47] The first defendant did not lead any evidence to suggest that there was no act of trespass by the second defendant. Therefore, insofar as the alleged trespass by the second defendant was concerned, the testimony of PW10 stands uncontradicted.

E **[48]** It was however not established that the first defendant participated or was involved in the actual physical act of trespass. The evidence was that the actual physical act of trespass was committed by the second defendant. Clearly therefore the second defendant is liable to the plaintiff in trespass.

F **[49]** It was also not established that the first defendant had instructed the second defendant to commit the trespass or that the first defendant's plans approved by MPKJ, when followed by the second defendant, would have resulted in the trespass.

[50] Although agency was invoked and pleaded in the statement of claim, G and the second defendant may be constituted an agent of the first defendant in the circumstances of this case, there was no evidence that the scope of the second defendant's agency in relation to the construction of the retaining wall included any necessary trespass onto the plaintiff's land.

[51] At most, there was the testimony of PW10 who said that Mr Lim, who H claimed to be the manager of the second defendant, told him that it was the first defendant's instructions to cut into the plaintiff's land. However, this was clearly hearsay and this allegation was squarely denied by DW2. Mr Lim was never subpoenaed by either party to testify. Although PW10's testimony may be admissible as to the fact that such a statement was made I by Mr Lim (see *Subramaniam v. Public Prosecutor* [1956] 1 LNS 115; [1956] MLJ 220), that testimony is not admissible as to the truth of what Mr Lim

said. Strictly speaking, the fact that Mr Lim said what it was alleged he said, *per se* and without the truth of that statement being put in issue, was not relevant in the context of this case, unlike in *Subramaniam* (*supra*).

[52] During cross-examination, it was suggested that the plaintiff's land could be seen from a certain point at one of the entrances to the first defendant's project. DW2 quite candidly agreed if one were to stand at that entrance, one would be able to see the second defendant's workers working on the road reserve. However, in the court's view, this *per se*, and without more, was not proof that the first defendant was actually aware at the material time that the second defendant had trespassed into and had "cut" the plaintiff's land. In fact, there was no evidence of any fence demarcating the boundary to the plaintiff's land.

[53] Learned counsel for the plaintiff referred to the first defendant's initial proposal to the plaintiff "to cut the slope" on the plaintiff's land, suggesting that the subsequent cutting of the plaintiff's land must therefore have been upon the instruction and/or acquiescence of the first defendant. This however was a *non sequitur*.

[54] Bearing in mind the first defendant's initial proposal to the plaintiff to cut the slope at the border of the plaintiff's land was to avoid constructing the retaining wall, it would seem unlikely that the first defendant would have instructed both the cutting of the plaintiff's land and the construction of the retaining wall, as well. It would also have been more expensive to do both.

[55] Based on the evidence, why the plaintiff's land was cut into by the second defendant was a question that remained unanswered. It was work that benefited none of the three parties to this case. The plaintiff did not ask for it. The retaining wall still had to be built. It was not work done on or to the first defendant's development. Whether it was a mistake or some other reason is not for the court to speculate. As is trite, courts of law have to proceed upon the evidence adduced.

[56] In *Freeman v. Rosher* [1849] 13 QB 780 at p. 1465, cited by learned counsel for the plaintiff, Patteson J stated:

> It is clear that a principal is not responsible for a trespass by an agent, unless he gave a prior authority or subsequent assent.

[57] Similarly, it was stated in the "*Law of Torts in Malaysia*", by Norchaya Talib, 2nd edn, at p. 384:

> A person who **instigates, procures or authorises** another to commit a tort is deemed to have committed the tort himself. The principle applies even though the authorisation or ratification is made after the commission of the tort. (emphasis added)

[58] In the court's view, on a balance of probabilities, none of the features that would impose liability on the first defendant through the agency of the second defendant was established or proven in this case.

[59] The issue therefore turns on whether the first defendant may be held liable for the trespass committed by the second defendant. In the plaintiff's statement of claim, it was pleaded and alleged *inter alia* that the trespass was committed by the first defendant, its servants and/or agents. Thus, liability through the first defendant's servants was pleaded. Such being the essence of vicarious liability, it therefore cannot be said that the principle of vicarious liability was not invoked.

[60] Generally, a person may not be held liable for the tortious act of another. Liability is premised on fault. However, it is a well-established principle of law that an employer may be held liable for the tortious conduct of an employee committed within the course of the employee's employment. This is the principle of vicarious liability. As Lord Sumption stated in the decision of the Supreme Court of UK in *Woodland v. Essex County Council* [2014] 1 All ER 482:

> [3] *In principle, liability in tort depends upon proof of a personal breach of duty. To that principle, there is at common law only one true exception, namely vicarious liability.* Where a defendant is vicariously liable for the tort of another, he commits no tort himself and may not even owe the relevant duty, but is held liable as a matter of public policy for the tort of the other: *Majrowski v. Guy's and St Thomas's NHS Trust* [2005] EWCA Civ 251, [2005] IRLR 340, [2005] QB 848. *The boundaries of vicarious liability have been expanded by recent decisions of the courts to embrace tortfeasors who are not employees of the defendant, but stand in a relationship which is sufficiently analogous to employment: Various Claimants v. Catholic Child Welfare Society* [2012] UKSC 56, [2013] 1 All ER 670, [2013] 2 AC 1. *But it has never extended to the negligence of those who are truly independent contractors,* such as Mrs Stopford appears to have been in this case. (emphasis added)

[61] It is now well established by the Federal Court in *Dr Kok Choong Seng & Anor v. Soo Cheng Lin & Another Appeal* [2017] 10 CLJ 529 that the principle enunciated by the Supreme Court of UK in *Various Claimants v. Catholic Child Welfare Society and Others* [2013] 2 AC 1, in respect of relationships to which the doctrine of vicarious liability may apply, is applicable in Malaysia.

[62] In *Various Claimants* (*supra*), the UK Supreme Court extended the relationship in respect of which vicarious liability may apply from one of employment, to one akin to employment. A two-stage test was devised for the application of the principle. The first is to determine whether there exists a relationship of employment or one that is akin to employment. The second is to determine if there is a sufficiently close connection between that relationship and the tortious conduct in question.

[63] In respect of the first stage, Lord Phillips listed out the criteria upon which a relationship of employment, or one akin to employment, may be determined. This list was reproduced by the Federal Court in *Dr Kok Choong Seng & Anor* (*supra*) at p. 560 of the report thus:

[74] In relation to stage 1, His Lordship identified a number of criteria which, when satisfied, "give rise to policy reasons that make it fair, just and reasonable to impose vicarious liability on the employer":

(i) The employer is more likely than the employee to have the means to compensate the victim, and can be expected to be insured;

(ii) The tort was committed as a result of the employee's activity done on behalf of the employer;

(iii) The employee's activity was part of the employer's business activity;

(iv) By employing the employee to carry on the activity, the employer has created the risk of the tort committed by the employee; and

(v) The employee was under the control of the employer, to a greater or lesser degree. Since many skills in modern employment are not susceptible to direction, the significance of control is that the employer can direct what the employee does, not how he does it.

[64] The first and obvious consideration is whether a company, a non-natural person, may be regarded as an employee, such that the principle of vicarious liability may apply. No authority has been provided by counsel where vicarious liability was imposed for the tortious acts of a legal person in the form of a limited company, such as the second defendant.

[65] In its original iteration, which is of some antiquity (see *Joel v. Morison* [1834] 172 ER 1338), no doubt the principle did not contemplate liability for torts committed by an incorporated company. However, as was famously announced by Lord Phillips in *Various Claimants*, "The law of vicarious liability is on the move", with the extension of the principle from one of employment to relationships that are "akin to employment", it would seem that there is no logical reason why a relationship between two companies may not be one akin to employment.

[66] The criteria identified by Lord Phillips can very well be established to exist between two companies. Indeed, subsidiaries may be incorporated to undertake specific projects on behalf of the parent in a relationship that would meet Lord Phillips' criteria (see the essay, *Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability*? by Phillip Morgan, Lecturer in Law, University of York and Visiting Associate Professor, University of Hong Kong).

[67] Similarly, there may exist a small business enterprise, organised as a limited company, predominantly or even solely to undertake services for an on behalf of a larger company and to submit to its control and direction, meeting the criteria set out by Lord Philips.

[68] While there may be no apparent logical reason why vicarious liability may not be extended to companies, there are foreseeable juridical impediments and, certainly, far reaching consequences should it be so extended.

[69] In this case however, the second defendant was a contractor engaged by the first defendant to carry out earthworks and to construct a retaining wall along a road reserve. Learned counsel for the plaintiff sought to demonstrate the element of control by reference to the letter of award issued by the first defendant to the second defendant.

[70] That letter of award dated 10 September 2014 contained several conditions among which were the following:

> 2. Scope of Works
>
> ...
>
> You are to provide all labour, materials, equipment and machinery to complete the works to the entire satisfaction of the Engineer.
>
> ...
>
> 3. Commence and Completion of Work.
>
> ...
>
> b) it is your responsibility to counter check the boundary surveying results. In the event of any discrepancies, you shall immediately notify the Engineer for solutions.
>
> c) you are required to submit the Work Programme for the entire project and Site Organization chart complete with the details of the site personnel upon the works for approval.
>
> ...
>
> 11. Site Supervisor.
>
> ... He shall be capable of receiving instructions, notices, attending all meeting and making decisions related to the works throughout the contract period. ...

[71] Contrary to the plaintiff's contention, the court is of the view that these clauses pertain to the scope of works and responsibility placed on the second defendant rather than control over the second defendant or how it was to carry out the works. In fact, the responsibility to countercheck the boundary survey results was clearly imposed on the second defendant.

[72] What the second defendant was doing at the material time was not part of the business activity of the first defendant as such. The second defendant was carrying on its own business in performing a contract that it had secured from the first defendant.

[73] From the letter of award and the testimony of DW2, there was nothing to indicate that the second defendant, which was organised as a limited company with its own place of business, was not a separate and independent enterprise of its own.

[74] Learned counsel for the plaintiff however, objected to the submissions by learned counsel for the first defendant that the second defendant was an independent contractor.

[75] The term "independent contractor" was not used in the first defendant's defence. However, the allegation in the statement of claim that the second defendant was the "servant/agent" of the first defendant was denied by the first defendant in its defence save for the fact of the first defendant's letter of award, which was admitted.

[76] In the circumstances, based on the denial and the letter of award pleaded and the evidence led, there was no reason why the first defendant cannot maintain that the second defendant was not proven to be an employee or akin to an employee of the first defendant and that in law, the second defendant was an independent contractor. Whether a person is an employee or independent contractor is a matter of law, to be determined based on the evidence adduced.

[77] Quite apart from whether the law of vicarious liability applies to relationships between companies *inter se*, on which point of law this court makes no finding, upon the evidence adduced, particularly that of the defendant through DW2 and the letter of award, the court is of the view that the second defendant was clearly an independent contractor of the first defendant.

[78] To aid in imposing liability upon the first defendant for the second defendant's trespass, the plaintiff also sought to invoke the principle of a non-delegable duty of care. This principle of law is of course premised upon a duty of care imposed on a party, which is non-delegable even to an independent contractor, with the result that the party on whom the duty is imposed, remains liable for any act that is tantamount to a breach of that duty, *albeit* one committed by its independent contractor.

[79] It was contended by the first defendant that this principle was not pleaded. To invoke the principle of non-delegable duty of care, it must be pleaded (see the decision of the Court of Appeal in *Kee Boon Suan & Ors v. Adventist Hospital & Clinical Services (M) & Ors And Other Appeals* [2018] 6 CLJ 334; [2018] 5 MLJ 321 at p. 338 paras. 56 & 57).

[80] In the statement of claim, negligence was alleged not only against the second defendant but also directly against the first defendant itself, and its servants and/or agents. Particulars of negligence specifically on the part of the first defendant its servants and/or agents were also pleaded. This was similar to the case of *Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal* [2018] 3 CLJ 427 at p. 468 at para. [109] where Md Raus Sharif CJ delivering the judgment of the Federal Court stated:

A [109] It was contended before us that the issue of non-delegable duties should not be allowed to be raised, since the plaintiff had not pleaded direct liability on the hospital's part for negligence. From a careful reading of the pleadings, this is not the case. *We note that the plaintiff had pleaded particulars of the hospital's own negligence in the statement of claim; in his reply to the hospital's defence, the plaintiff had also alluded to the hospital's duty of care* B *to the plaintiff to ensure that a competent standard of practice is exercised during the operation. Since "the nature of a non-delegable duty is, in essence, a positive duty to ensure that reasonable care is taken" (Dr Kok Choong Seng), we find that the essence of a non-delegable duty has been sufficiently pleaded.* (emphasis added)

Similarly, in this case, although the term "non-delegable duty" was not C pleaded as such, the essence of the duty was sufficiently pleaded.

[81] Although the principle existed in several isolated circumstances, it was not until the decision of the Supreme Court of UK in *Woodland v. Essex County Council* [2014] 1 All ER 482 that a single unifying theory for the concept of non-delegable duty was recognised. This was done by Lord D Sumption in *Woodland* (*supra*) in the following words:

[22] ... Non-delegable duties of care are inconsistent with the fault-based principles on which the law of negligence is based, and are therefore exceptional. ...

E [23] In my view, the time has come to recognise that Lord Greene in *Gold v. Essex CC* and Denning LJ in *Cassidy v. Ministry of Health* were correct in identifying the underlying principle, and while I would not necessarily subscribe to every *dictum* in the Australian cases, in my opinion they are broadly correct in their analysis of the factors that have given rise to non-delegable duties of care. If the highway and hazard cases are put to one F side, the remaining cases are characterised by the following defining features: **(1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury.** Other examples are likely to be prisoners and residents in care homes. **(2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or** G **omission itself,** (i) which places the claimant in the actual custody, charge or care of the defendant, and (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an element of control over the claimant, which varies H in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren. *(3) The claimant has no control over how the defendant chooses to perform those obligations,* ie, whether personally or through employees or through third parties. *(4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant;* and the third party is exercising, for the I purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it. *(5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him.* (emphasis added)

[82] Since then, the Federal Court has, in *Dr Kok Choong Seng & Anor,* accepted the principle of a non-delegable duty of care enunciated in *Woodland* as applicable law in Malaysia.

[83] Having regard to the characteristics upon which a non-delegable duty may arise listed out in *Woodland*, the court finds that several of those characteristics do not exist in this case.

[84] It cannot be said that the plaintiff was in the genre of an especially vulnerable plaintiff or one that was dependent on the first defendant to be protected from harm. There was no antecedent relationship between the parties to speak about which placed the plaintiff in the custody, charge or care of the first defendant and from which it may be imputed that the first defendant assumed a positive duty to protect the plaintiff from any harm. Indeed, the first defendant's proposal to the plaintiff *via* its emails of 21 February 2014 and 10 March 2014, drew no response. As such, the issue of any antecedent relationship cannot even be said to have arisen.

[85] Lord Sumption in *Woodland* however recognised that there were two other instances where a non-delegable duty may arise and they were described as the "highway and hazard cases". The highway cases were concerned with inherently hazardous operations or dangers on the public highway. The hazard cases involved the engagement of independent contractors to undertake inherently hazardous works or extra-hazardous operations (see *Honeywill and Stein Ltd v. Larking Bros (London's Commercial Photographers) Ltd* [1934] 1 KB 191) including hazardous non-natural use of land such as was the case in *Rylands v. Fletcher* [1861-73] All ER Rep 1.

[86] Clearly, neither of these exceptions apply to the case at hand. What was required of the second defendant was to build a retaining wall along the road reserve below, and away from, the plaintiff's land.

[87] The retaining wall that was approved for construction and that was eventually constructed by the second defendant was on the road reserve and several metres away from the boundary of the plaintiff's land. It was not a non-natural use of land or property occupied by the first defendant. It was not a case of nuisance.

[88] To the court, the construction of the retaining wall cannot be said to be an activity that was inherently hazardous. Neither party has suggested otherwise. As Lord Sumption pointed out in *Woodland*, at p. 489:

> [9] *Rylands v. Fletcher* and *Dalton v. Henry Angus & Co* might have been explained by reference to the hazardous character of the operation carried out by the defendant's contractor, and sometimes have been, notably by the Court of Appeal in *Honeywill and Stein Ltd v. Larkin Bros (London's Commercial Photographers) Ltd*. But it is clear from Lord Blackburn's observations that *the essential point about them was that there was an antecedent*

relationship between the parties as neighbouring landowners, from which a positive duty independent of the wrongful act itself could be derived. The duty was personal to the defendant, because it attached to him in his capacity as the occupier of the neighbouring land from which the hazard originated.

[10] All of these features were also present in *Hughes v. Percival* [1883] 8 App Cas 443, [1881-5] All ER Rep 44, which was one of the first cases in which the same principle was applied to a duty of care. The parties were neighbouring householders with a party wall. A builder working in the defendant's house negligently cut into the party wall, causing the partial collapse of both the defendant's house and the plaintiff's house next-door. On its facts, therefore, the case had many of the classic features of the cases about non-delegable duties in the law of nuisance, and Lord Blackburn, delivering the leading speech in the Appellate Committee, proceeded by analogy with them. (emphasis added)

[89] In the court's view, none of these features exist upon which the principle of a non-delegable duty of care may be said to apply in this case.

[90] In *Mehrzad Nabavieh & Anor v. Chong Shao Fen & Anor And Another Appeal* [2016] 5 CLJ 236; [2016] 3 MLJ 500, a case relied on by the plaintiff, the owners of a property were held liable for damage caused by their contractors to an adjacent property. The task that the contractors were appointed to perform was the demolition of an old structure on the owners' property. In the process, damage to the plaintiffs' adjoining property was caused. The contractors were found to be independent contractors.

[91] The owners of the property were found liable by the learned trial judge applying the principle of a non-delegable duty of care. The Court of Appeal held that the principle did not apply to the owners. However, the finding of liability against the owners was not set aside. From the judgment of the Court of Appeal, it was clear that the owners' liability was premised on the existence of a special risk of damage and the owners' lack of supervision of the contractors. It was a case that belonged to the genre of the "hazard cases" identified by Lord Sumption. As Nallini Pathmanathan JCA (as Her Ladyship then was) at p. 244 (CLJ); pp. 508-509 (MLJ) of the report said:

[27] *That is the general principle, that employers are not liable for the acts of independent contractors. However in that case, Lord Watson went on to say that in cases where the work is necessarily attended with risk, he cannot free himself from liability by binding the contractor to take effectual precautions. He is bound, as in a question with the party injured, to see that the contract is performed, and is therefore liable, as well as the contractor, to repair any damage which may be done.* (emphasis added.) Therefore applying Lord Watson's pronouncement here, the first and second defendants should not be held liable alone. The fourth and fifth defendants should also be liable for the damage which was occasioned to the plaintiffs' property.

> [28] Subsequent to these cases, the English Court of Appeal in the case of *Alcock v. Wraith and Others* [1991] Times, 23 December held that *the general rule is that one is not responsible for a tort by an independent contractor. But the exception is where the activity involved some special risk of damage, or is work which from its very nature was likely to cause danger/damage.* The true basis for the exception in party-wall cases was where the law conferred a right to carry out work on a wall/division, and that work involved a risk of damage to the adjoining property, the law also imposed a duty on the party carrying out the work to ensure that it was carried out carefully.
>
> ...
>
> [30] *Therefore from a consideration of the case law subsequent to Bower v. Peate, it may be concluded that both the independent contractor as well as the employer would be liable for any damage occasioned to the property of neighbouring land.*
> (emphasis added)

(see *Ng Huat Seng v. Munib Mohammad Madni* [2017] SGCA 58, where demolition of an existing dwelling house by independent contractors which resulted in damage to the plaintiff's property was held not to be an "ultra-hazardous" activity; see also *MCST Plan No 3322 v. Tiong Aik Construction Pte Ltd* [2016] SGCA 40).

[92] *Datuk Bandar Dewan Bandaraya Kuala Lumpur v. Ong Kok Peng & Anor* [1993] 3 CLJ 205; [1993] 2 MLJ 234 was another authority relied on by the plaintiff. In *Datuk Bandar Dewan Bandaraya* (*supra*) the plaintiff fell down a lift shaft in a block of flats owned by the defendant. After the doors of the lift had opened, the plaintiff stepped into it but found that the lift was not where it should be. There were no signs. This was attributed to the maintenance contractors. In the course of his judgment, Peh Swee Chin SCJ stated as follows:

> *While the rule that an employer of an independent contractor is not liable for the default or negligence of such contractor no doubt exists, there are exceptions,* and it is outside the province of this judgment to elaborate all the exceptions but only briefly to deal with them except those which are directly concerned with the instant case.
>
> *The first exception is where an employer has not exercised care in selecting a competent contractor as was much pressed in argument in the present case. The second exception is a group of cases or situations when the duty to take care is said to be 'non-delegable'.* A non-delegable duty to take care means in effect that the employer would have to see to it that such duty of care is exercised, whether by his contractor or not, otherwise he would be equally liable as the contractor, in addition, in most cases, to the liability of his contractor. Such non-delegable duty exists in the case of work causing withdrawal of support to a neighbour's land, see *Bower v. Peat* 3; work done on a highway, see *Tarry v. Ashton* 4; cases of a master's duties for his servant's safety at common law, see *Wilsons & Clyde Coal Co Ltd v. Flynn* 5; cases of strict liability and finally cases of statutory duty imposed on certain categories of persons.
>
> The last two mentioned exceptions require elaboration as they have considerable relevance to our instant case.

A *The exception in regard to cases of strict liability above-mentioned refers to cases of such strict liability at common law, such as the rule in Rylands v. Fletcher6. The exception covers, inter alia, all cases involving extra hazardous acts or omissions, or situations created by them, which all involve special danger to others,* please see the reference to them, e.g. in *Salsbury v. Woodland & Ors*7, such as damage by fire, see *Honeywill & Stein Ltd v. Larkin Brothers Ltd*8 so that an employer
B of an independent contractor, to repeat, cannot escape liability by delegating the work to such independent contractor.

In our view, the situation described earlier as facing the plaintiff was a situation created by such an extra hazardous act or omission involving special danger to such users of that lift. The defendant could not escape such liability entrusted to
C or by entrusting to the third party. That is why we confirmed the judgment of the High Court against the defendant in favour of the plaintiff for this reason alone. (emphasis added)

Therefore, *Datuk Bandar Dewan Bandaraya* was also in the genre of the "hazardous cases".

D **[93]** In the present case, it was not as if the retaining wall erected failed or that the second defendant was incompetent. It was not trespass or damage caused in the execution or conduct of an inherently hazardous activity. What happened here was a conscious act of "cutting down" the plaintiff's land and the removal of earth therefrom. Clearly, the second defendant had gone
E beyond merely building the retaining wall based on the approval by MPKJ.

[94] The feature of a hazardous activity, or ultra-hazardous activity (see *Honeywill and Stein, Ltd v. Larkin Brothers (London's Commercial Photographers), Ltd* [1934] 1 KB 191; *Biffa Waste Services Ltd and Another v. Maschinenfabrik Ernst Hese GmbH and Others* [2009] 3 WLR 324), does not exist in this case.
F The feature of damage flowing from a hazardous activity by an occupier of land adjacent to the plaintiff's land was also not present.

[95] The plaintiff also pointed to the terms and conditions imposed by the MPKJ when granting approval for the erection of the retaining wall. Among
G the terms imposed by MPKJ were the following:

SYARAT-SYARAT

1.1 ...

...

H 1.8 Adalah menjadi tanggungjawab penuh pihak pemaju untuk mendapat kebenaran lot-lot bersebelahan sekiranya dijangkakan akan berlaku perlanggaraan sempadan. Pihak MPKJ tidak boleh disabitkan sama sekali sekiranya berlaku sebarang perkara berbangkit di masa hadapan.

2. KERJA TANAH

I 2.1 Kerja-kerja tanah yang dicadangkan mestilah dengan cara selamat kepada harta benda yang berdekatan. Apabila perlanggaraan berlaku (encroachment) kepada harta benda itu, surat kebenaran/Kerjasama mestilah diperolehi terlebih dahulu

[96] These terms, including MPKJ's approval for the retaining wall and earthworks, addressed to the first defendant's consultants were copied to the first defendant. They made it quite clear that the first defendant was responsible to secure the approval of neighbouring lots if it was expected that any encroachment may occur. The terms also require care to be taken in respect of nearby property. The danger of encroachment or damage to nearby property was however not obvious as the retaining wall was not constructed at or near to the boundary of the plaintiff's land.

[97] These were terms imposed by the MPKJ. Any breach of these terms would render the first defendant answerable to the MPKJ. Although the essence of these terms may overlap with a duty imposed by the common law, they may be delegated to an independent contractor unless they fall within the principle of a non-delegable duty of care or known exceptions to the fault-based principles in tort.

[98] In the court's view, these terms and conditions imposed by the MPKJ may not somehow be converted into common law duties such as would render the principle of non-delegable duty of care applicable, without more.

[99] At common law, even if the first defendant owed the plaintiff any duty, there was no breach by the first defendant. It was not the first defendant that committed the act of trespass. There was no plea or evidence that the first and second defendants acted in concert in a conspiracy.

[100] So, we return full circle to the issue of law at the beginning, namely whether the first defendant may be liable for the second defendant's tortious conduct. Having regard to the foregoing principles, this court can find no exception to the general rule expressed by Lord Sumption in *Woodland* that, "In principle, liability in tort depends upon proof of a personal breach of duty" or the rule described by Peh Swee Chin SCJ in *Datuk Bandar Dewan Bandaraya* "that an employer of an independent contractor is not liable for the default or negligence of such contractor".

[101] In summary therefore, in this case, there exists no exception to the general rule upon which the first defendant may be held liable for the trespass committed by the second defendant.

The Damage Suffered

[102] Having held that the first defendant is not liable for the trespass of the second defendant, the following consideration as to damage suffered is essentially to determine the appropriate compensation to be awarded against the first defendant.

[103] The loss and damage claimed by the plaintiff were made up of special damages and the cost of reinstatement of the plaintiff's land, at the places where it was cut into, back to its original height.

[104] The encroachment into the plaintiff's land ranged from between 15.76 metres to 26.72 metres at certain points. The reduction in height of the plaintiff's land was up to some 5.92 metres. These were given in the testimony of PW9, a surveyor. Although this does not take into account possible loss of earth by erosion, there was no suggestion that any such loss would be significant.

[105] The volume of earth that was removed from the plaintiff's land was calculated as 2,449 cubic metres. At the price of RM30 per cubic metre, this works out to RM73,470. Documentary evidence of these figures from the plaintiff's consultants were given in evidence.

[106] The plaintiff also claimed special damages in the form of consultancy fees totaling RM80,708.22. Particulars and evidence of which were given as follows:

(i) JTK Consult Sdn Bhd	RM47,700
(ii) WLT Associates	RM 5,000
(iii) Test Sdn Bhd	RM24,775.22
(iv) Jurukur Utama	RM3,233

There was also a claim for printing charges of RM133.56.

[107] The cost to reinstate the plaintiff's land to its original height was estimated to be RM1,362,405. The estimate was given by the plaintiff's consultant WLT Associates whose principal, a quantity surveyor, testified to this as PW6.

[108] This sum of RM1,362,405 was calculated based on a proposal by the plaintiff's consultant, JTK Consult Sdn Bhd. The Managing Director of JTK Consult Sdn Bhd, an engineer, testified as PW7. What was proposed was the construction of a retaining wall in order to reinstate the plaintiff's land to its original level based on survey plans before the trespass in 2014 and after the trespass in 2016.

[109] The first defendant led evidence from its engineer that was critical of JTK Consult Sdn Bhd's proposed retaining wall. The criticisms levelled were that there were insufficient boreholes such that the soil test would not be accurate and that no boreholes were carried out on the plaintiff's land itself. The proposed height of the retaining wall was 6.4 metres but PW7 agreed that this was subject to adjustments on-site during construction and it may be lower. PW7 also agreed under cross-examination that JTK Consult Sdn Bhd's design for the proposed retaining wall was not final and that there would be other changes during construction.

[110] It was pointed out by the first defendant that JTK Consult Sdn Bhd's proposed retaining wall, which was designed to be located beyond the boundary of the plaintiff's land, did not have the approval of MPKJ and the Hulu Langat land office. Approval for the wall may not be given. Indeed, variations may also be required. That such approvals were required was testified to by PW5, who was the Timbalan Pengarah Jabatan Kejuruteraan, MPKJ.

[111] The first defendant also pointed out of JTK Consult Sdn Bhd's proposed retaining wall that the size of the micropiles was unnecessarily large, the distance between the piles could be increased and the proposed length of the micropiles was excessive. PW7 under cross-examination agreed that there were solutions that could reduce the costs of construction of the proposed retaining wall and that there may not be a need for 12 metre-long micropiles.

[112] In addition, DW5, a registered valuer and estate agent, testified that based on a comparison method of valuation, the market value of the plaintiff's land rose rather than depreciated between 2014 and 2018. DW5 also testified that the affected area of the plaintiff's land amounted to only some 3% of its total area and had no effect on the value of the plaintiff's land. No evidence was led to suggest that the price of the plaintiff's land could have been higher but for the trespass.

[113] The plaintiff led no evidence of any diminution in value of the plaintiff's land by reason of the trespass. In fact, the evidence as they stand pointed to there being no diminution in value caused by the trespass.

[114] The main thrust of the plaintiff's case was to recover the cost of reinstating the plaintiff's land.

[115] In *Beatrice Ramanathan (F) & Anor v. Shah Alam Properties Sdn Bhd & Another Case* [1994] 4 CLJ 646 at pp. 650 to 651, Lim Beng Choon J said:

> One case which was referred to by Counsel for the defendant is *Dodd Properties (Kent) Ltd. & Anor. v. Canterbury City Council & Ors.* [1980] 1 All ER 928 @ 938 where Donaldson LJ said:
>
> > The general object underlying the rules for the assessment of damages is, so far as is possible by means of a monetary award, to place the plaintiff in the position in which he would have occupied if he had not suffered the wrong complained of, be that wrong a tort or a breach of contract. *In the case of a tort causing damage to real property, this object is achieved by the application of one or the other of two quite different measures of damage, or occasionally, a combination of the two. The first is to take the capital value of the property in the undamaged state and to compare it with its value in a damaged state. The second is to take the cost of repair or reinstatement. Which is appropriate will depend on a number of factors, such as the plaintiff's future intentions as to the use of the property and the reasonableness of those intentions.* If he reasonably intends to sell the property in its damaged state,

> clearly the diminution in capital value is the true measure of damage. If he reasonably intends to continue to occupy it and to repair the damage, clearly the cost of repairs is the true measure. And there may be in between situations.

From the cases cited above, it is clear to me that in order to achieve the general object underlying the rules for the assessment of damages *in the case of a tort causing damage to real property, the Court is required to apply one or the other of two quite different measures of damage. The first is to adopt the diminution in value to the plaintiff and the second is to adopt the actual cost of repair or reinstatement. Which measure is appropriate will depend on a number of factors.* Be that as it may the diminution in value is the true measure of damage if and only if the plaintiff is selling or reasonably intending to sell the property in its damaged state or where it can be established that the plaintiff is holding on to the property merely for investment purposes. On the other hand if the plaintiff intends to continue to occupy it and to repair the damage the proper measure is clearly the cost of all such repairs. (emphasis added)

[116] The court's approach in granting damages, whether it be based on diminution of value of the land or reinstatement costs, was considered by the Court of Appeal in *Milik Perusahaan Sdn Bhd & Anor v. Kembang Masyur Sdn Bhd* [2003] 1 CLJ 12; [2003] 1 MLJ 6. Gopal Sri Ram JCA (as His Lordship then was) delivering the judgment of the court, referred to and relied on a relevant decision of the Irish Supreme Court:

> That brings us to the central question, namely whether there has been any error of principle in this case. *Here, we would agree with the submission of Mr Anantham that there is no a priori rule that the registrar assessing damages ought to have resort first to the diminution in value principle and exclude its application on the evidence before having resort to the reinstatement method.* Counsel's submission is borne out by the authorities. Once again we must be forgiven if we do not refer to the copious citation of cases during argument.
>
> The sole authority we need to refer to is a case cited to us by both sides. It is the judgment of the Irish Supreme Court in *Munelly v. Calcon* [1978] IR 387. In that case Henchey J said:
>
> > Since this case was decided in the High Court, the question of the correct measure of damages in circumstances such as those now before us was considered by May J in *CR Taylor Ltd v. Hepworths Ltd.* Among the passages cited with approval in the judgment in that case is the following from *McGregor on Damages* (13th Ed – 1972) at para 1061:
> >
> > > The difficulty in deciding between diminution in value and cost of reinstatement arises from the fact that the plaintiff may want his property in the same state as before the commission of the tort but the amount required to effect this may be substantially greater than the amount

> by which the value of the property has been diminished. *The test which appears to be the appropriate one is the reasonableness of the plaintiff's desire to reinstate the property; this will be judged in part by the advantages to him of reinstatement in relation to the extra cost to the defendant in having to pay damages for reinstatement rather than damages calculated by the diminution in the value of the land.*

Accepting that passage as correctly reflecting the state of the law, at p 667 of the report May J said:

> The various decided cases on each side of the line to which my attention has been drawn, and to some of which I have referred in this judgment, show in my opinion merely the application in them of two basic principles of law to the facts of those various cases. *These two basic principles* are, *first,* that whenever damages are to be awarded against a tortfeasor or against a man who has broken a contract, then those damages shall be such as will, so far as money can, put the plaintiff in the same position as he would have been had the tort or breach of contract not occurred. But *secondly,* the damages to be awarded are to be reasonable, reasonable that is as between the plaintiff on the one hand and the defendant on the other.
>
> I accept those two principles as being basis to, although not necessarily exhaustive of, the concept of *restitutio in integrum* on which the law of damages rests in cases such as this. It is in the application of those principles that difficulty may arise, *for a court, in endeavoring to award a sum which will be both compensatory and reasonable, will be called on to give consideration, with emphasis varying from case to case, to matters such as the nature of property, the plaintiff's relation to it, the nature of the wrongful act causing the damage, the conduct of the parties subsequent to the wrongful act, and the pecuniary, economic or other relevant implications or consequences of reinstatement damages as compared with diminished value damages.* The reported cases, therefore, required to be viewed primarily as exemplifications of the application to special facts of two principles to which I have referred. (emphasis added)

See also *Ruxley Electronics and Construction Ltd v. Forsyth; Laddingford Enclosures Ltd v. Forsyth* [1995] 3 All ER 268, where reasonableness was also identified as a central feature of a claim for reinstatement involving a breach of contract.

[117] Thus, reasonableness is a factor for determining the loss suffered rather than for determining between the remedies of reinstatement or diminution in value of the land.

[118] Having regard to the foregoing, it cannot also be denied that insofar as land is concerned, it has an appreciably different character when compared to chattels. Equity for example had always recognised the especial nature of land and was willing to accord remedies that were not available in respect of chattels.

[119] There was evidence led by PW10 of an intention to develop the plaintiff's land by building hilltop bungalows, exploiting the height of the land. However, these plans were merely preliminary conceptual plans prepared in 2006. There was no evidence of the plans to build being a live issue or having any probability of occurring in the near future.

[120] The first defendant on the other hand pointed out that to build on the land, there has to be a set-back of 6.1 metres from the boundary of the plaintiff's land. It was pointed out that the plaintiff's intention to reinstate was questionable as no approval had been obtained for JTK Consult Sdn Bhd's proposed retaining wall and no steps had been taken to begin construction.

[121] Having regard to the fact that there was no evidence of any diminution to the value of the land, or some necessity that the plaintiff's land be reinstated either for reasons such as safety or some intended use and, further, the fact that after all these years since the trespass no steps have been taken to either develop the plaintiff's land or to reinstate it, compensation in the amount of the projected reinstatement costs based on JTK Consult Sdn Bhd's proposed retaining wall would be unreasonable in the circumstances. In addition, JTK Consult Sdn Bhd's proposed retaining wall and its projected cost were also somewhat tentative.

[122] This case was distinguishable from those cases involving the remedy of reinstatement where the damage caused was to properties in the form of buildings that were occupied and intended to be occupied (see for example *Hollebone v. Midhurst and Fernhurst Builders Ltd* [1968] 1 Lloyd's Rep 38; *Harbutt's Plasticine Ltd v. Wayne Tank and Pump Co Ltd* [1970] 1 All ER 225; *Ward v. Cannock Chase District Council* [1986] Ch 546). Here, what was affected was the reduction in height at the boundary of an empty piece of land located on high ground with the affected area amounting to only some 3% of the total area.

[123] Bearing in mind the fact that the affected part of the plaintiff's land in its original stead was high, if it is to be built upon as pointed out by the first defendant, the plaintiff would probably need to excavate and to backfill. Building the retaining wall proposed by JTK Consult Sdn Bhd would in effect improve the plaintiff's land for the purposes of development rather than merely to reinstate it. It could mean that if the plaintiff was to build, no further work need be done to secure the slope.

[124] The amount claimed for JTK Consult Sdn Bhd's proposed wall was in essence merely an estimate. That there exist variable factors that would result in lowering cost were recognised by PW7.

[125] Having regard to the foregoing and the evidence led, special damages suffered by the plaintiff is assessed at RM80,841.78 and general damages in the sum of RM500,000.

[126] The plaintiff also sought exemplary and aggravated damages. These were premised on the allegation that by reason of the trespass, the retaining wall that the first defendant had to construct was lower and thus cheaper.

[127] Ultimately however, it was not established that the actual height of the retaining wall built by the second defendant according to the plans approved by MPKJ was appreciably lower than what was intended and approved. In any event, no liability has been found as against the first defendant.

[128] In *Sambaga Valli K R Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal* [2017] 1 LNS 500; [2018] 1 MLJ 784, Mohd Zawawi Salleh JCA (as His Lordship then was) delivering the judgment of the Court of Appeal, said:

> [32] Now, *aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interest of personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant.*
>
> [33] The *exemplary damages or punitive damages* – the two terms now regarded as interchangeable – *are additional damages awarded with reference to the conduct of the defendant, to signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant.* Exemplary damages may be awarded where the defendant has acted with vindictiveness or malice, or where he has acted with a 'contumelious disregard' for the right to the plaintiff. The primary purpose of an award of exemplary damages may be deterrent, or punitive and retributory, and the award may also have an important function in vindicating the rights of the plaintiff (see *Rookes v. Barnard* [1964] 1 All ER 367; *AB and Others v. South West Water Services Ltd* [1993] 1 All ER 609; *Broome v. Cassell & Co Ltd* [1971] 2 QB 354, *Laksmana Realty Sdn Bhd v. Goh Eng Hwa and Another Appeal* [2005] 4 CLJ 871; [2006] 1 MLJ 675). (emphasis added)

[129] In this case no damage has been suffered by the plaintiff that cannot be adequately compensated with damages without resorting to aggravated damages. There was no evidence of any conduct on the part of the second defendant that warrants additional damages punitive in nature. As against the second defendant, all that has been established was its trespass. There was no reason why the normal heads of damages, as opposed to exemplary and aggravated damages, would not be appropriate or adequate.

[130] It must not be forgotten that the primary objective of the court in civil cases is to compensate and not to punish. Although a punitive element exists and is recognised (see generally *Rookes v. Barnard* [1964] 1 All ER 367; *Broome v. Cassell & Co Ltd* [1971] 2 QB 354, *Laksmana Realty Sdn Bhd v. Goh Eng Hwa* [2005] 4 CLJ 871; [2006] 1 MLJ 675), it is in the exception rather than the norm that aggravated or punitive damages are awarded. Unfortunately, it has become the norm rather than the exception for claimants to press for exemplary and aggravated damages at every turn.

[131] Mandatory injunctions were also sought for the reinstatement of the plaintiff's land. However, in the circumstances, the injunctions sought were no longer necessary or appropriate having regard to the damages awarded.

Conclusion

[132] In conclusion and for the reasons given above, judgment was entered against the second defendant in the sum of RM80,841.78 as special damages and RM500,000 as general damages together with interest at the rate of 5% per annum from the date of filing of this action to the date of full realisation and costs.

[133] The plaintiff's action against the first defendant was dismissed with costs.